IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (ST) NO.28635 OF 2005.

Kamal Shivaji Walunj & Ors. ...Appellants

Versus

Maruti Shankar Walunj ...Respondent

Shri I.S.Thakur for the Appellants.

CORAM : ABHAY S.OKA, J.
DATED : 17th December, 2007.

P.C.:

1. Heard advocates appearing for the appellants. The appellants are permitted to amend the memorandum of appeal by incorporating the additional grounds tendered today.

2. The first submission of the learned counsel appearing for the appellants is that though the issue of bar of limitation was agitated by the appellants before the trial Court, the same has not been considered by both the Courts below. He submitted that the suit filed by the original plaintiffs was barred by Rule 2 of Order II of the Code of Civil Procedure, 1908 and the said aspect has not been considered by the Appellate Court.

3. I have considered the submissions. The suit was filed by the respondent for partition and separate possession. The suit was decreed by the trial Court by holding that the plaintiff is entitled to one third

undivided share. An appeal was preferred by the appellants. The Appellate Court in paragraph No.8 of the judgment has recorded the following submissions of the learned advocate appearing for the appellants:

> "8. During the course of arguments, it is submitted by learned advocate Shri R.G.Rane that appellants, are not challenging the findings given by the trial court holding that the plaintiff is having 1/3rd share in the suit property, so also the present appellants are having share therein. It is also submitted by advocate Rane that considering the size of the suit houses, it is not practical to effect the partition thereof and hence, while effecting the partition of suit houses. Direction may be given to concerned authority that the opportunity may be given to purchase the share in the house to the other party".

Thus, it is apparent that before the Appellate Court, in substance there was no challenge on merits of the decree passed by the trial Court. It is not the case of the appellants that the aforesaid submissions have been incorrectly recorded. So far as issue of limitation is concerned, it is true that the trial Court has not

framed any issue. The memorandum of appeal preferred in the District Court shows that the said issue was not agitated by the appellants. It appears that even point regarding bar of suit was not agitated before first appellate Court. Paragraph 8 of the judgment of the Appellate Court records that the advocate for appellant appearing before the Appellate Court has fairly stated that the appellants were not challenging the findings given by the trial Court holding that the original plaintiff was having one third share. In view of what is observed by the Appellate Court, no substantial question of law arises. Second Appeal is dismissed with no orders as to costs.

JUDGE